

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 99-102

July 30, 1999

HYPERION COMMUNICATIONS OF MAINE
Petition for Finding of Public
Convenience and Necessity to
Provide Service as a Local
Exchange Carrier Service and
as a Interexchange Telephone
Utility

ORDER GRANTING AUTHORITY
TO PROVIDE LOCAL EXCHANGE
AND INTEREXCHANGE SERVICE
AS A RESELLER AND APPROVING
SCHEDULES OF RATES AND TERMS
AND CONDITIONS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

In this Order, the Commission grants Hyperion Communications of Maine (Hyperion) the authority to provide competitive local exchange service and intrastate interexchange service as a reseller in the State of Maine, and approves the Company's Terms and Conditions and Rate Schedules. We also exempt Hyperion from the requirements of Chapter 210, *Uniform System of Accounts*, and of 35-A M.R.S.A. §§ 707 and 708, subject to the conditions described below.

I. APPROVAL OF APPLICATION TO SERVE

On February 17, 1999, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, Hyperion filed a petition with the Commission requesting authority to provide facilities-based local exchange telephone service and interexchange services in Maine. Subsequently, Hyperion has stated that it wishes to provide only resold services at this time. Before we grant approval under section 2102 for another public utility to provide service, 35-A M.R.S.A. § 2105 requires us to find that the public convenience and necessity require an additional utility to provide service in a location where another utility is already authorized to provide, or is providing, the same or similar service.

47 U.S.C. § 253(a), enacted by the Telecommunications Act of 1996, states:

(a) In General. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service.

47 U.S.C. § 253(b) states, however:

(b) State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued

quality of telecommunications services, and safeguard the rights of consumers.

We find that granting Hyperion the authority to provide local exchange and interexchange services in Maine will not impede the preservation or advancement of the public interest goals or policies stated in section 253(b).

Hyperion's application provides reasonable information indicating that its financial and management capabilities are adequate to provide local and facilities-based interexchange services in Maine.

II. SERVICE TERRITORY

A. Interexchange Service Authority

Hyperion has requested authority to provide interexchange service as a reseller throughout the state. We grant that authority.

B. Local Service Authority

Hyperion has requested authority to provide resold local exchange service throughout the state. It states that it will offer service only as a reseller of local exchange service provided by other local exchange carriers (LECs). We define local resale as the offering of local exchange service purchased from another competitive local exchange carrier (CLEC) pursuant to 47 U.S.C. § 251(b)(1) or from an incumbent local exchange carrier (ILEC) at a wholesale discount pursuant to 47 U.S.C. § 251(c)(4). The purchase of unbundled network elements from an ILEC and their use in providing local exchange service is facilities-based service and is not resale. Hyperion's authority to provide local exchange service is limited to resale unless it obtains further authorization from the Commission.

Hyperion's proposed Terms and Conditions, which we approve today, also limit its local exchange service offerings to resold services. If Hyperion wishes to expand the scope of its authority in the future to provide facilities-based switched local exchange services, it shall seek approval pursuant to 35-A M.R.S.A. § 2102, requesting the Commission to amend this Order. Hyperion shall simultaneously file amended Rates, Terms and Conditions pursuant to 35-A M.R.S.A. § 307 that state its proposed revised service territory. Hyperion's proposed service territory for facilities-based local exchange service shall be limited to those areas in which it will be ready to provide facilities-based switched local exchange service within a reasonable period of time. The application shall include information establishing readiness. It is not necessary for a CLEC with existing authority to present a full application in order to request additional service territory authority. The Commission will act expeditiously on any such application and revisions of Terms and Conditions.

III. APPROVAL OF TERMS AND CONDITIONS AND RATE SCHEDULES

We allow the terms and conditions proposed by Hyperion to go into effect. Hyperion has used the Commission's expedited process. That process includes standard terms and conditions that comply with Maine law and the Commission's Rules. If there is any conflict between a provision in Hyperion's terms and conditions and the Commission's Rules or a statute, the rule or statute will control. Included in the Terms and Conditions are pages stating that in the event of such a conflict, the statute or the Commission's Rule will control.

Hyperion has filed four tariffs. Number 1 (Local Exchange Service), Number 2 (Switched Access) and No. 3 (Dedicated Access) were filed on June 30, 1999. No. 4 (Interexchange Service) was filed on July 6, 1999. Tariff No. 1 supersedes the tariff filed with Hyperion's original application. Hyperion states that services under Tariff Nos. 2 and 3 will not be available until such time as it offers facilities-based services. Accordingly, each of those tariffs state that they will not be effective until that time and they will not state an effective date prior to providing service under Tariff No. 2 (Switched Access). Hyperion shall ensure that its intrastate access rates are no higher than its interstate access rates, as required by 35-A M.R.S.A. § 7101-B, and shall revise Tariff No. 2 to the extent necessary.

In general, the Commission believes that a competitive telecommunications market results in services and rates that benefit the public. We believe that the acceptability of Hyperion's services and rates in the market place provides an adequate test of the reasonableness of the Company's rates. Accordingly, we allow the rates proposed by Hyperion to go into effect.

IV. INTERCONNECTION AGREEMENT

In order to provide local exchange service, a CLEC must, as a practical matter, obtain an interconnection agreement with the ILEC(s) providing service in any area where it intends to provide service. In the absence of such an agreement, it will not be possible for Hyperion's customers to call customers of the ILEC(s), and vice versa. Interconnection agreements are governed by 47 U.S.C. § 252, and must be approved by this Commission.

If a CLEC makes a bona fide request for an interconnection agreement with an ILEC that is a "rural telephone company" as defined in 47 U.S.C. § 153(37), the "rural exemption" of 47 U.S.C. § 251(f) will apply. All of Maine's independent incumbent local exchange carriers are "rural telephone companies." A rural telephone company is not required to negotiate an interconnection agreement or provide interconnection until after the Commission, pursuant to 47 U.S.C. § 251(f)(1)(B), finds that the requirement "is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service provisions of] section 254" Although the service territory we grant today is statewide and Hyperion's terms and conditions do not limit its service territory, as a practical matter it cannot offer local exchange service in the service territory of a rural ILEC until such time as that ILEC's rural exemption is terminated.

On March 9, 1999, in Docket No. 99-103, the Commission approved an agreement between Hyperion and New England Telephone and Telegraph Company d/b/a Bell Atlantic pursuant to 47 U.S.C. § 252. As a condition of providing local exchange service, Hyperion must comply with the terms of any interconnection agreements that it has reached with any ILECs and that have been approved by the Commission.

If Hyperion executes an interconnect agreement(s) with ILECs(s) it shall obtain approval of that agreement by this Commission.

V. WAIVER OF PAYMENT OF ACCESS CHARGES

Our approval of Hyperion's application to provide interexchange service in Maine is conditioned on the payment of access charges to local exchange carriers who have on file with the Commission approved access charge rate schedules. Because the Commission's Chapter 280 requires *each* interexchange carrier to pay applicable access charges, the chapter ordinarily requires both an underlying carrier and a switchless reseller¹ to pay access charges for the same call. Switchless resellers may avoid double payment of access by asking the Commission to waive certain sections of Chapter 280.

The Commission has determined that Hyperion is a switchless reseller. Using the Commission's standard Waiver Request Form (attached to this Order), the Company has asked the Commission to waive the requirement of Chapter 280 that requires it to pay access charges, subject to the conditions and requirements described on the Waiver Request Form. We find that the granting of the waiver upon those conditions is reasonable and grant the waiver subject to the stated conditions. Hyperion has stated that IXC, Inc. will be its underlying carrier from which it purchases services that it resells. IXC, Inc. is authorized by the Commission to provide intrastate interexchange service and has stated in a letter filed on July 29, 1999, it will pay access charges for the intrastate interexchange services it sells to Hyperion. If Hyperion begins to use another underlying carrier, it shall notify the Commission as required by the ordering paragraphs. If Hyperion becomes a facilities-based interexchange carrier, the waiver from the requirement to pay access charges terminates, and Hyperion shall notify the Commission and all LECs from which it obtains access, as required by the ordering paragraphs.

¹For purposes of applying the access charge waiver, we define switchless resellers as entities which do not own, lease, or control any switching facilities, or private lines, that it will use to provide telecommunication services in Maine. A reseller who owns a switch in another state, and plans to use that switch to switch or carry Maine traffic, is a switched reseller. A reseller who does not own facilities in Maine or any other state, or who owns facilities in another state but does not plan to use that switch to carry Maine traffic, is a switchless reseller.

VI. WAIVERS; REPORTING REQUIREMENTS

As a condition of providing local exchange service, Hyperion must comply with the terms of any applicable Commission orders or rules that may govern local interconnection and compensation for interconnection. Hyperion shall also comply with any applicable Commission Rules or orders that govern universal service, public safety and welfare, service quality and consumer rights.

Pursuant to sections 11(A) and 12(A) of Chapter 280, which govern carriers' interexchange activities, Hyperion is exempt from Chapter 210 of the Commission's Rules, which governs telephone utility accounting and annual financial reports, and from 35-A M.R.S.A. §§ 707 and 708, which govern approvals for reorganizations and contracts with affiliated interests. Although Hyperion has not requested a waiver from the requirements of Chapter 210, or from 35-A M.R.S.A. §§ 707 and 708, for its local exchange service, the Commission has the authority to grant such waivers on its own motion. Because Hyperion's rates and operations are likely to be subject to market forces, we do not see any present need to subject the Company to those requirements.

However, the Company must report its annual intrastate gross operating revenues, its revenues derived from sales to other carriers, and its annual intrastate minutes for use for the purpose of determining its regulatory assessment.² If Hyperion resells service to other switched or switchless telephone service providers, the Company must maintain its records so that it may separately identify those sales. Pursuant to Chapter 280, § 11(B), Hyperion shall maintain records sufficient to identify and to allow auditing of traffic volumes, intrastate interexchange billings for both retail and wholesale services, and all information that is necessary to calculate access or interconnection charges in accordance with this Chapter. Those records shall be maintained for a minimum of 2 calendar years.

The exemptions from the affiliated interest approval requirements of 35-A M.R.S.A. §§ 707 and 708 granted by Chapter 280, § 12(A) are subject to the notice requirements contained in Chapter 280, §§ 12(B) and (C) and in the ordering paragraphs below.

In addition, Hyperion shall inform the Commission of any changes to its corporate structure and ownership and of any changes in the name under which it does business, as set forth in the ordering paragraphs below. If necessary, it shall also refile its rate schedules and terms and conditions to reflect its new identity.

VII. OTHER REQUIREMENTS

²The Commission mails the annual reporting forms to carriers in January of each year. The completed forms are due by April 1 of each year.

Hyperion shall comply with all applicable rules of the Commission and statutes of the State of Maine, including the customer notification rule described in the ordering paragraphs below.

VIII. ORDERING PARAGRAPHS

Accordingly, we

1. Grant, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, the request of Hyperion Communications of Maine to provide competitive local exchange telephone service as a reseller in the State of Maine, and interexchange service as a reseller in the State of Maine;
2. Exempt Hyperion Communications of Maine from the requirements of Chapter 210 of the Commission's Rules, except that it must report the revenue and minutes of use information that is requested by the Commission, on or before April 1 of each year;
3. Exempt Hyperion Communications of Maine from approval requirements of 35-A M.R.S.A. §§ 707 and 708, but Hyperion shall provide notice to the Commission of any reorganization, as defined in 35-A M.R.S.A. § 707(1)(A), that results in a merger, sale or transfer of a controlling interest of Hyperion or of any entity that owns more than 50% of Hyperion. The notice required by this subsection shall be filed within 10 days following any reorganization described herein, as required by Chapter 280, § 12(B). As required by Chapter 280, § 12(C), Hyperion Communications of Maine shall also provide notice of any other changes in the name under which it does business (d/b/a), any change of the location of its business office, and any change of its contact person. Hyperion Communications of Maine shall provide the Administrative Director of the Commission with notice of any of the changes described within 30 days following the change. If necessary, Hyperion shall amend its rate schedules and terms and conditions to reflect any change in identity; and
4. Order that Hyperion Communications of Maine's proposed terms and conditions and rate schedules Tariff No. 1, Original Pages Title - 134, shall be effective on the date of this Order. Tariff No. 1 consists of the Original Pages filed on June 30, 1999, except for the Replacement pages noted in this paragraph; Original Pages (1st Replacement) 12, 15, 26, 43, 46, 98 and 113 filed on July 19, 1993; and Original Pages (2nd Replacement) 88 and 89 filed on July 23, 1999;
5. Order that Hyperion Communications of Maine's proposed terms and conditions and rate schedules Tariff No. 2, Original Pages Title - 62, shall be effective when Hyperion is granted authority by the Commission to provide facilities-based local exchange service. Hyperion shall ensure that its access rates under Tariff No. 2 comply with the requirements of 35-A M.R.S.A. § 7101-B prior to providing access services. Tariff No. 2 consists of Original Pages Title -3 and 5 - 62 filed on June 30, 1999; and Original Page (1st Replacement) 4 filed on July 19, 1993;

6. Order that Hyperion Communications of Maine's proposed terms and conditions and rate schedules Tariff No. 3, Original Pages Title - 32, shall be effective when Hyperion is granted authority by the Commission to provide facilities-based services. Tariff No. 3 consists of Original Pages Title – 2 and 4 – 32 filed on June 30, 1999; and Original Page (1st Replacement) 3 filed on July 19, 1993;

7. Order that Hyperion Communications of Maine's proposed terms and conditions and rate schedules Tariff No. 4, Original Pages Title - 19, shall be effective on the date of this Order. Tariff No. 4 consists of Original Pages Title – 9 and 11-18 filed on June 30, 1999; and Original Pages (1st Replacement) 10 and 19 filed on July 19, 1993;

8. Grant Hyperion Communications of Maine's Request for a Waiver of any requirement that it pay access charges, subject to the conditions and requirements stated on the attached Waiver Request Form, including the requirement that a facilities-based underlying carrier authorized to provide interexchange service in Maine pay access charges. Hyperion Communications of Maine shall notify the Commission of any change in its underlying carrier within 30 days following the change, and shall provide the Commission with certification by the new underlying carrier that it will pay access charges, except that certification is not required if the underlying carrier is AT&T, MCI WorldCom or Sprint. Hyperion Communications of Maine shall immediately inform the Commission and all local exchange carriers in the State of Maine from which Hyperion will be purchasing access services if there is any change in its operations that will result in its carrying, switching, or any processing of any of its own traffic, at which time the waiver will terminate and Hyperion Communications of Maine shall begin to pay access charges to those local exchange carriers that have approved access charge schedules on file with the Commission;

9. Order that Hyperion Communications of Maine shall comply with all applicable rules of the Commission, including the requirement of Chapter 280 § 10 that interexchange carriers provide notice to all affected customers of an increase to any rate that is greater than 20% to all affected customers.

Dated at Augusta, Maine, this 30th day of July, 1999.

BY ORDER OF THE COMMISSION

Raymond J. Robichaud
Assistant Administrative Director

COMMISSIONERS VOTING FOR:

Welch
Nugent
Diamond